Supreme Court, U.S.
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No. 98-1190

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WISCONSIN CENTRAL LIMITED,

Petitioner,

vs.

THE BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY,

Respondent,

-and-

CSX TRANSPORTATION, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly concluded in the unique circumstances of this case that the district court could properly bar petitioner from asserting an arbitrable statutory defense that it had withheld during a prior arbitration proceeding.

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petition accurately lists the parties to the proceeding.

Pursuant to Supreme Court Rule 29.6, The Baltimore and Ohio Chicago Terminal Railroad Company and CSX Transportation, Inc. state that The Baltimore and Ohio Chicago Terminal Railroad Company is a wholly owned subsidiary of CSX Transportation, Inc., which is owned by CSX Corporation, a publicly held corporation. The Baltimore and Ohio Chicago Terminal Railroad Company has no nonwholly owned subsidiaries. The following are the nonwholly owned subsidiaries of CSX Transportation, Inc.: Allegheny and Western Railway Company; The Baltimore and Cumberland Valley Rail Road Extension; The Central Railroad Company of South Carolina; The Cincinnati Inter-Terminal Railroad Company; Dayton and Michigan Railroad Company; The Home Avenue Railroad Company.

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STATEMENT OF THE CASE

On June 11, 1993, The Baltimore and Ohio Chicago Terminal Railroad Company (BOCT) filed a three-count complaint against Wisconsin Central Ltd. (WCL), seeking enforcement of a tariff. On July 6, 1993, WCL filed its answer and a seven-count counterclaim against BOCT and CSX Transportation, Inc. (CSXT).[1] Count I alleged breach of a contract that superseded the tariff. WCL did not attach a copy of the alleged contract to its counterclaim, and it was only later determined that WCL was referring to a marked-up copy of an unsigned preliminary draft combined with a responding letter. Although the draft contract contained a provision requiring "final and conclusive" arbitration of all irreconcilable disputes, WCL did not request arbitration.

On July 7, 1993, the day after WCL filed its counterclaim, the parties appeared in district court for a first status report. When the district court judge suggested arbitration, BOCT agreed to consider it. However, on July 20, 1993, prior to the filing of answers to the counterclaim by BOCT and CSXT, WCL stated that it would not arbitrate.

On July 26 and 28, 1993, BOCT and CSXT filed their respective answers to WCL's counterclaim and denied the existence of a contract. On August 3, 1993, BOCT suggested that WCL participate in voluntary mediation. During the mediation, the district court required periodic status reports.

As part of the mediation proceeding, the parties exchanged documents, none of which had been attached to WCL's counterclaim. Following the exchange of documents and upon further investigation, BOCT concluded that an enforceable

1. Unless otherwise indicated, BOCT and CSXT will be collectively designated as BOCT.

contract governing the interchange of freight cars might have been entered into between the parties. Instead of fighting over the existence of a contract, BOCT decided to amend the pleadings to admit its existence. BOCT (only) sought leave to add an additional count to its complaint alleging breach of contract. BOCT and CSXT each requested leave of court to amend their answers to WCL's counterclaim to admit the existence of a contract and both requested the court to send the matter to arbitration pursuant to the arbitration provisions of the interchange agreement.

Over WCL's objection that arbitration had not been timely requested, on March 1, 1994, the district court granted the BOCT and CSXT motions and sent the contract claims of BOCT and WCL to arbitration. It recognized that the breach of contract claims of both BOCT and WCL were clearly arbitrable. It found that WCL's common law counterclaims (quantum meruit, promissory estoppel, and fraud) might be arbitrable. It also addressed WCL's three counterclaims brought under the Interstate Commerce Act (ICA). As to them, it warned that the arbitration might moot some of those claims.

In its district court pleadings filed prior to arbitration, WCL never raised a filed-rate doctrine claim. At the start of arbitration, the parties framed the issues to be resolved by the arbitrators. WCL again raised no filed-rate doctrine claim. It sought to raise only two claims under the ICA, *i.e.*, its claims alleging unreasonable rates and discrimination under §§ 10701(a) and 10741. BOCT opposed WCL's efforts, arguing that if WCL had either of the alleged ICA claims, the proper place to address them was the Interstate Commerce Commission (ICC). The arbitration panel ruled that all of the issues raised by the parties were arbitrable except the defenses asserted by WCL based on 49 U.S.C. §§ 10701(a) and 10741. Following the arbitrators' ruling, WCL did not raise a filed-rate defense

in the arbitration hearing, nor did it attempt to file a claim with the arbitrators regarding the filed-rate doctrine. The arbitrators subsequently ruled against WCL on all of the claims it had raised.

In all, the arbitration lasted 12 days. It involved over 3,000 pages of testimony and introduction of over 400 exhibits. In addition, the parties submitted hundreds of pages in post-hearing briefs to the arbitration panel.

Following the adverse arbitration award and 3 years into this litigation, WCL moved to "reinstate" a proposed four-count "Amended Counterclaim". Included in it was a new claim (Count I) based on the filed-rate doctrine. This claim contended that the interchange agreement (which WCL had originally asserted and on which it based its defense to BOCT's original complaint) could not apply to the parties' exchange of freight cars and that BOCT's tariff must govern. The district court rejected WCL's tactic. (Appendix to Petition for Writ of Certiorari ("App.") 46a-57a). It ruled that any filed-rate dispute had arisen with regard to the interchange agreement and, therefore, was arbitrable. (App. 48a-50a). It held that WCL was not excused from raising the filed-rate doctrine during arbitration. (App. 50a-51a). The district court stated that WCL was required to anticipate an adverse decision on its breach of contract claim and, in fact, had done so by raising two other ICA claims in arbitration. (App. 50a-51a, 73a). It also ruled that equitable principles weighed against WCL because WCL had consistently argued in the district court and in arbitration that the interchange agreement was controlling. (App. 51a). Finally, the district court found that WCL's proposed Count I was futile because BOCT's standard intermediate switch charges under the agreement were its filed tariff rates. (App. 51a-52a). Since the agreement "wrapped around" BOCT's filed tariff rates, enforcing those rates would result in the same judgment and damage award. (App. 52a).

On appeal the Seventh Circuit also rejected WCL's tactic. It ruled that a claim under the filed-tariff doctrine was plainly within the scope of the arbitration clause of the interchange agreement. (App. 11a-12a). It held that WCL's filed-rate defense presented an issue of law that WCL should have given the arbitrators an opportunity to decide, and held that WCL's tactic of withholding its filed-rate defense from the arbitrators was an inexcusable procedural waiver of the defense. (App. 12a-17a). Noting that the "purpose of the filed-rate doctrine is to prevent shippers from negotiating secret discounts with carriers" (App. 12a) and that "WCL is not a shipper; and the interchange agreement incorporated the filed tariff and so did not entitle BOCT to a higher than tariff rate . . . "(App. 13a), it also found that the outcome was unaffected by WCL's failure to present a filed-rate defense to the arbitrators.

REASONS FOR DENYING THE WRIT

The Petition argues that the district court erred in refusing to permit WCL to assert a statutory defense to an arbitrated claim after receiving an unfavorable award. This factbound issue does not warrant review by this Court and is unlikely to arise again in any court on similar facts. The decision below was a plainly correct application of settled law, and no conflict among the circuits or other basis for review is shown.

I.

THE SEVENTH CIRCUIT DECISION IS FULLY CONSISTENT WITH THE FILED-RATE DOCTRINE.

WCL undertakes a lengthy and unnecessary discussion of the filed-rate doctrine in order to support its accusation that the Seventh Circuit was guilty of generating a new and impermissible equitable exception to the filed-rate doctrine.

The Seventh Circuit created no such exception, instead applying established law against withholding claims.

As the Seventh Circuit held, and WCL's Petition does not dispute, a defense that the filed-rate doctrine prohibits payment for regulated transportation or service under an unfiled contract at a rate different than the tariff is an arbitrable defense. The Seventh Circuit also held, and WCL's Petition also does not dispute, that the scope of the arbitration clause in the interchange agreement encompassed WCL's filed-rate defense. Consequently, WCL was not exempt from obeying the rules on timely pursuit of arbitrable issues and presentation of defenses. Federal courts will not permit a party to stand by during arbitration, withholding certain arguments, then, upon losing the arbitration, raise such arguments in judicial proceedings to enforce the award. *Eurocar Italia, S.P.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 998 (5th Cir. 1995); *National Wrecking Co. v. International Brotherhood of Teamsters, Local 731*, 990 F.2d 957, 960 (7th Cir. 1993).

This principle is a clear corollary of the fundamental rule that "[a] defense cannot be adjudicated separate from the claim . . . to which it applies. . . ." *Reiter v. Cooper*, 507 U S. 258, 265 (1993). Having conceded that its "filed-rate doctrine claim would have been a legal defense to BOCT's claim for recovery of switching charges under the Interchange Agreement" (WCL's Seventh Circuit Appellant's Brief, at 40), WCL cannot avoid the consequences of failing to present its filed-rate defense to the arbitration tribunal adjudicating the claim to which the defense was interposed. WCL's defense should have been raised in the arbitration; it was not; it is waived.

WCL could have raised its filed-rate defense in opposition to BOCT's motion to send the dispute to arbitration. Yet the

only defense offered to BOCT's motion was WCL's claim that BOCT waited too long to seek arbitration. WCL's failure to present the defense to the district court before the case went to arbitration is a further reason to preclude WCL from raising the defense after receiving an unfavorable arbitration award.

WCL cannot excuse its delay in raising the filed-rate defense by claiming that there was no reason to assert the defense until after the arbitrators issued their award. As the district court noted:

> WCL was required to anticipate an adverse decision by the [arbitrators] and raise all possible arbitrable defenses. WCL is not entitled to try each of its defenses in separate actions.

(App. 50a-51a).

WCL knew that the central question of the arbitration was what BOCT was entitled to receive from WCL for providing intermediate switching services. As the district court noted:

> At the arbitration hearing, there was no dispute that [BOCT] provided intermediate switching services to WCL. The only question was whether WCL was obligated to pay for the services, according to [BOCT's] filed-tariff rate, under the Interchange Agreement.

(App. 24a-25a). WCL should have presented its defense that BOCT was entitled to receive only the filed rate at the arbitration.

WCL's insinuation that the arbitrators would not have permitted WCL to present any ICA claims is irrelevant. Fear

that a defense will not be considered does not excuse a failure to assert the defense. WCL raised only two statutory claims in arbitration, neither of which involved the filed-rate doctrine. The arbitrators merely ruled that those two defenses were not arbitrable. WCL always remained free to raise its filed-rate defense. It chose to remain silent, holding back its filed-rate defense for a second round of litigation.

Instead of accepting responsibility for its failed litigation strategy, WCL accuses the Seventh Circuit of ignoring a century of precedent. But WCL refuses to acknowledge the difference between substantive waiver and procedural waiver. The Seventh Circuit made no change in the rule that, if the filed-rate doctrine applies, parties cannot waive it by agreement. Nor did the Seventh Circuit rule that the doctrine may be waived by stipulation in court. But these principles do not apply here because this case involves an issue of procedural waiver. The filed-rate doctrine is not a doctrine of subject matter jurisdiction. Like any other party, WCL had an obligation to raise the filed-rate defense at the appropriate time in the litigation. WCL should have raised the defense prior to or during the arbitration.

WCL cites no case for the proposition that the filed-rate doctrine is exempt from procedural law or that a party may raise the defense at any time, no matter how late in the proceeding. WCL was bound to follow the rules of procedure. It seeks to distinguish the Seventh Circuit's citation of *West Coast Truck Lines. Inc. v. American Industries, Inc.*, 893 F.2d 229 (9th Cir. 1990), by arguing that the plaintiff there was precluded from using the filed-rate doctrine to challenge an ICC ruling because the failure to timely appeal from an ICC ruling is governed by a statute, *i.e.*, 28 U.S.C. § 2344. However, this statute does not address the filed-rate doctrine; it simply addresses the procedure for challenging ICC rulings. Under WCL's faulty logic if there is no statutory prohibition against

untimely assertion of the filed-rate defense, WCL would be allowed to appeal months, even years, after the entry of a final award. Indeed, under WCL's analysis, the judgment will never truly be final. WCL would forever have the right to collaterally attack it based upon a ground that should have been raised before the arbitrators.

The Seventh Circuit was not deviating from a century of governing precedent. It was attempting to protect the orderly procedure of the courthouse. The Seventh Circuit rightly labeled WCL's position as "absurd". (App. 18a).

II.

THE SEVENTH CIRCUIT DECISION IS CONSISTENT WITH PUBLIC TRANSPORTATION POLICY.

WCL insists that the Seventh Circuit shirked its duty to determine whether the arbitration award is unenforceable for public policy reasons by failing to direct the district court to rule on WCL's filed-rate defense following the arbitration. This argument was never raised in the courts below. The short answer to this argument is that the decisions of the Seventh Circuit and the district court both recognize that the arbitration award does not conflict with the filed-rate doctrine, irrespective of whether that doctrine is a public policy defense and whether WCL's filed-rate defense is congruent with the filed-rate doctrine.

The statutory basis for the filed-rate doctrine, 49 U.S.C. § 10761, provides, in pertinent part:

> . . . a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that

> transportation or service only if the rate for the transportation or service is contained in a tariff . . . That carrier may not charge or receive a different compensation for the transportation or service than the rate specified in the tariff. . . .

(App. 84a). This Court has determined that the ICA "specifically prohibits a carrier from providing service at any rate other than the filed (also known as the tariff) rate". *Maislin Industries v. Primary Steel*, 497 U.S. 116, 120 (1990). The rate received by BOCT for services provided to WCL does not violate this rule, because it was a rate stated in a tariff.

The district court, in finding that WCL's filed-rate defense is, therefore, futile, noted:

> . . . WCL seeks to apply [BOCT's] tariff rates on file with the ICC. This outcome, however, has already occurred. The Interchange Agreement provided that [BOCT's] "standard intermediate switch" charges applied — i.e., [BOCT's] filed tariff rates. The Interchange Agreement and [BOCT's] filed tariff were compatible arrangements — the Interchange Agreement "wrapped around" [BOCT's] filed tariff rate. Enforcing [BOCT's] tariff rates would result in the same judgment against WCL as contained in the Award, because once the Panel found liability under the Interchange Agreement, it applied [BOCT's] tariff rates and calculated damages owed to [BOCT].

(App. 52a).

The Seventh Circuit concisely stated the same thing:

> . . . the interchange agreement incorporated the filed tariff and so did not entitle BOCT to a higher than tariff rate . . .

(App. 13a).

Even if the interchange agreement should have been filed with the ICC, the filed-rate doctrine is not a defense to BOCT's claim since the rate for the service provided to WCL is the rate specified in the tariff.[2] The district court's confirmation of the arbitration award and the Seventh Circuit's affirmance of the district court ruling are judicial recognition that the arbitration award does not violate any public policy.

WCL's citation of *Seaboard Coast Line R. Co. v. National R. Passenger Corp.*, 554 F.2d 657 (5th Cir. 1977), for the proposition that the filed-rate doctrine can be raised as a defense to the enforcement of an arbitration award is more than a little disingenuous.[3] *Seaboard* predates the decisions of this Court,

2. WCL laments that BOCT was awarded damages for a longer period than would have been allowed if the 49 U.S.C. § 11705 (formerly 11706) statute of limitations applicable to tariff claims had been enforced. WCL, however, never requested either the arbitrators or the courts to limit the period for which BOCT could recover tariff-based charges under the interchange agreement to the period specified by the ICA. Not having timely asserted this inapplicable statute of limitations, WCL is now precluded from raising it. That BOCT is now entitled to a longer damage computation period than WCL argues BOCT would otherwise have been entitled to is the result of WCL's litigation strategy and does not offend the filed-rate doctrine. The Seventh Circuit agreed. (App. 9a).

3. In its Seventh Circuit briefing WCL made no mention of *Seaboard*, claiming instead that *In Re American Freight Sys., Inc.*, 164 B.R. 341 (D. Kan. 1994), was the *only* precedent on point. WCL's relegation of *American* (Cont'd)

such as *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (and others cited in the Seventh Circuit opinion at App. 13a-14a), regarding the presumed arbitrability of statutory claims. It is unlikely that the Fifth Circuit would regard *Seaboard* as precluding arbitration of filed-rate doctrine claims. *See Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir. 1997) (ADA claim arbitrable); *Rojas v. TK Communications, Inc.*, 87 F.3d 745 (5th Cir. 1996) (Title VII claim arbitrable); *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995) (age discrimination claim arbitrable); *Kramer v. Smith Barney*, 80 F.3d 1080 (5th Cir. 1996) (ERISA claim arbitrable). Moreover, the *Seaboard* court did not determine whether the arbitration clause there was broad enough in scope to encompass statutory claims, while the Seventh Circuit here plainly held that the scope of the interchange agreement's arbitration provision was wide enough to require arbitration of WCL's filed-rate defense.

III.

THE FILED-RATE DOCTRINE DOES NOT APPLY TO THE FACTS OF THIS CASE

WCL's filed-rate doctrine defense would have been futile in any event even if WCL had timely raised it. The contract in this case is a contract among railroad common carriers. For decades the former Interstate Commerce Act contained a general provision requiring carriers to file with the ICC "copies of all contracts, agreements, or arrangements with other common carriers." Former 49 U.S.C. § 6(5). In 1949, however,

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(Cont'd)

Freight to a footnote in WCL's Petition is recognition of its lack of precedential value. It is also worth noting that the failure of the *American Freight* court to cite *Seaboard* undermines the authoritativeness ascribed to the latter decision here by WCL.

Congress authorized the ICC to exclude from this requirement any type of agreement "the filing of which, in its opinion, is not necessary in the public interest." Act of Aug. 2, 1949, ch. 379, § 5, 63 Stat. 485, 486 (1949). The ICC soon did so, deciding in 1952 to relieve carriers of the obligation to file most types of contracts between carriers:

> Common carriers subject to part I of the Interstate Commerce Act [such as WCL, BOCT, and CSXT] are hereby relieved from the provisions of section 6 (5) of said act requiring the filing with the Commission of copies of all **contracts, agreements, and arrangements with other common carriers,** except that common carriers subject to part I of said act shall file . . . such contracts, agreements, and arrangements as shall have been or may hereafter be required to be filed by order, rule or regulation . . .

49 C.F.R. § 1030.1(a)(1995) (emphasis supplied). That regulation remained in effect throughout the arbitration and was repealed only in 1997 [62 Fed. Reg. 50885-87 (Sept. 29, 1997)], and neither the ICC nor its successor, the Surface Transportation Board, has promulgated any order, rule, or regulation requiring carriers to file interchange agreements or agreements for interline switching. Thus, the filed-rate doctrine is inapplicable to the intercarrier arrangements here. *See also Railroad Transportation Contracts, ex parte No. 387*, 367 ICC 9, 11 (1982).

Finally, as discussed above, the interchange agreement did not deviate from the filed tariff — it required WCL to pay BOCT's filed rate. WCL's Petition concedes that "any recovery of switching charges by BOCT, whether under the agreement or its tariff, would be based upon the same tariff rate." Petition, at 7, n.3.

IV.

THE SEVENTH CIRCUIT DECISION DOES NOT WARRANT REVIEW BY THIS COURT.

WCL's Petition cites no authority conflicting with the Seventh Circuit's ruling that WCL's failure to present its filed-rate defense to the arbitrators was a procedural waiver of this claim.

The Seventh Circuit's decision is bound up in the facts of this case. As the district court noted:

> . . . this case is not a classic filed rate doctrine case, since the arrangement between the parties was negotiated and embodied in a written agreement obligating WCL to pay [BOCT's] filed tariff rate.

(App. 32a-33a). The decisions of both the district court and the Seventh Circuit to preclude WCL from presenting a defense not made during the arbitration are premised on the unique facts of this case. WCL, if it had a filed-rate defense, could have asserted the defense at numerous earlier points in the litigation before the conclusion of a lengthy and expensive arbitration. It was WCL's litigation strategy to withhold its claimed defense until it saw how it fared in the arbitration. Having gambled and lost, the courts below declined to relieve WCL of the adverse consequences of its litigation plan. It is against this factual background that the Seventh Circuit's decision must be viewed.

It is unlikely that any court will ever again see a party withhold a filed-rate defense from an arbitration panel. For this reason, the precedential value of the Seventh Circuit decision is slight.

The decision of the Seventh Circuit does not warrant review by this Court.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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